No. 7908

United States
Circuit Court of Appeals
For the Ninth Circuit

CLAUDE EMERSON DuVALL,
Apellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF OF APPELLANT

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ARIZONA

LESLIE C. HARDY,
422 Professional Building,
Phoenix, Arizona.
Attorney for Appellant.

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STATEMENT OF THE CASE

1. *The Facts*

The appellant, Claude Emerson DuVall, appeals from a judgment of the United States District Court for the District of Arizona adjudging him guilty of a violation of Sec. 696, Title 26, U.S.C.A. (Harrison Narcotic Act). The indictment is in two counts and it was returned by the grand jury at Tucson on May 2, 1935 (Tr. 1). The appellant, when indicted, was a physician licensed to practice in the State of Arizona and he was registered under the Harrison Narcotic Act and had paid the tax required by the Act (Tr. 17, 18).

By the first count of the indictment appellant, as a physician, was charged with selling to Pat Rooney, alias Fred Humphrey, four grains of morphine sulphate not in pursuance of a written order on a form issued in blank for that purpose by the Commissioner of International Revenue in that appellant issued and dispensed to Rooney a prescription for that amount of the drug, Rooney not then being a patient of appellant, and appellant not so dispensing and distributing the drug in the course of his professional practice only. The second count of the indictment differs from the first only in charging the quantity of the drug dispensed, it alleging that three grains of morphine were dispensed (Tr. 2).

The first trial of the case began on June 12, 1935, and terminated June 20, 1935, as a result of the jury disagreeing (Tr. 15). The second trial came on for hearing June 25, 1935 (Tr. 15) and on June 31, 1935, a verdict of guilty on both counts of the indictment was returned against appellant (Tr. 52). On July 1, 1935, appellant was sentenced to imprisonment for fourteen months on each count, sentence upon the second count to run concurrently with the first and he was fined $500.00 on each count (Tr. 53). On July 1, 1935, (the same day he was sentenced) appellant filed a notice of appeal (Tr. 53). Pursuant to an order of the trial court entered *ex mero motu* appellant was enlarged upon bail pending appeal (Tr. 55).

The proof disclosed that Rooney (the person who received the prescriptions described in the indictment) had been addicted to the use of morphine for 18 or 19 years (Tr. 18) and he had used as much as 10 to 15 grains per day. Rooney received both prescriptions from appellant on the same day (Tr.

19, 20). The government witness Moore, who was a federal narcotic agent, sent Rooney to appellant to secure the prescriptions and gave Rooney the money to pay for them. He also gave Rooney the money to have the prescriptions filled (Tr. 19, 20, 21). The agent Moore received from Rooney the drug obtained on the prescriptions and Moore kept the drug in his possession until it was introduced in evidence at the trial (Tr. 19, 20, 21). None of the drug was used by Rooney (Tr. 19, 20, 21).

2. *The Questions Presented*

Counsel for appellant has diligently attempted to discard all driftwood and to present as succinctly as possible suggested errors which appear substantial both as to law and facts. Five major assignments of error are urged and these are divided into subjects correlated to the principal errors assigned (Tr. 5). They relate to:

I The sufficiency of the indictment (Tr. 5, 6).

II A hypothetical question propounded to a government witness—physician (Tr. 6, 7, 8).

III A variance between the proof and the indictment only as respects the allegation of sale (Tr. 8, 9).

IV, V The error of the trial court in charging the jury with respect to two instructions (Tr. 9 to 14).

The sufficiency of the evidence to sustain the verdict is not urged because the errors assigned, if meritorious, would defeat the judgment regardless of the sufficiency of the evidence to sustain it.

Counsel for the government proposed no amendments to the Bill of Exceptions and agreed that it is correct (Tr. 59).

SPECIFICATIONS OF ERROR

SPECIFICATION I

(Assignment of Error I, Tr. 5)

(a) Neither counts of the indictment alleges that the prescription mentioned therein was filled or that Rooney obtained the drug thereon, or at all.

(b) The Harrison Narcotic Act, in its essential constitutional aspect is a revenue measure, and has no application to the indictment herein because it charges appellant, as a physician, with issuing two prescriptions for small quantities of narcotic thereby disclosing upon its face that appellant did no act which deprived, or intended to deprive, the United States of revenue.

SPECIFICATION II

(Assignment of Error II, Tr. 6, 7, 8)

The hypothetical question propounded by counsel for the government to the government witness, Dr. S. D. Townsend, is in an essential part based upon Article 85, Exceptions 1 & 2, of Regulations No. 5 promulgated January 1, 1928, by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury (Tr. 21, 22, 23, 24). The hypothetical question, while stating that appellant delivered the prescriptions for morphine to an addict, nevertheless further states and assumes that the ad-

dict was not at the time suffering from *incurable* disease, and thus the question is founded in an essential part upon Article 85, Exceptions 1 & 2 (Tr. 24, 25) which are void because

(a) The Harrison Narcotic Act does not confer regulatory power upon the executive officers named to the extent thus asserted.

(b) The regulation is beyond the power of the Congress to confer upon executive officers.

(c) The Harrison Narcotic Act itself sufficiently and completely defines the professional conduct of a physician registered under the Act.

(d) The regulation is an assertion of power reserved to the several states.

SPECIFICATION III

(Assignment of Error III, Tr. 8, 9)

There is a variance between the proof and the indictment in that the proof discloses that the sale, if there was a sale within the meaning of the Harrison Act, was made to Narcotic Agent Moore rather than to Rooney, the person named in the indictment (Tr. 18, 19, 20, 21).

SPECIFICATION IV

(Assignment of Error IV, Tr. 9 to 13)

The court erred in giving the following instruction to the jury during the course of its charge, viz:

"The Harrison Narcotic Act further provides: 'The Commissioner of Internal Revenue, with

the approval of the Secretary of the Treasury, shall make all needful rules and regulations for carrying the provisions of the Act into effect.' Such rules and regulations were duly promulgated, as required by the Act, and among other provisions of the regulations now in force and effect is the following: Article 85, which reads as follows: 'A prescription in order to be effective in legalizing the possession of unstamped narcotic products and eliminating the necessity for use of order forms, must be issued for legitimate medical purposes. An order purporting to be a prescription issued to an addict or habitual user of narcotics, not in the course of professional treatment but for the purpose of providing the user with narcotics sufficient to keep him comfortable by maintaining his customary use, is not a prescription within the meaning and intent of the Act.'"

"Now, there are certain exceptions to the rule, set forth as follows: 'Exceptions to this rule may be properly recognized, (1), in the treatment of incurable disease, such as cancer, advanced tuberculosis, and other diseases well recognized as coming within this class, where a physician directly in charge of a bona fide patient sufferin the course of his professional practice and strictly for legitimate medical purposes, and in so prescribing endorses upon the prescription that the drug is dispensed in the treatment of an incurable disease; or if he prefers, he may endorse upon the prescription 'Exception (1) Article 85'. (2) A physician may prescribe for an aged or infirm addict whose collapse would result from the withdrawal of the drug, provided he endorse upon the prescription, 'Exception (2) Article 85'."

"Now, Gentlemen, you are instructed that the phrases 'to a patient' and in the course of his professional practice only' as used in the statute

and rules and regulations which have been read to you, are intended to confine the immunity of the registered physician in dispensing narcotic drugs strictly within the bounds of the physician's professional practice and not to extend it to sale by such physician intended to cater to the appetite or satisfy the cravings of one addicted to the drug only. A prescription issued for either of the latter purposes protects neither the physician who knowingly issues it nor the dealer who knowingly accepts and fills it."

"The statute does not prescribe the disease for which morphine may be supplied. Regulation 85 in its provisions forbids the giving of a prescription to an addict or habitual user of narcotics not in the course of professional treatment, but for the purpose of providing him with a sufficient quantity to keep him comfortable by maintaining his customary use. Neither the statute nor the regulations precludes a physician from giving an addict a moderate amount of drugs in order to relieve a condition incident to addiction, if the physician acts in good faith and in accord with fair medical standards." (Tr. 32, 33, 34).

The foregoing instruction is erroneous and prejudicial for the following reasons:

(a) It is objectionable for all the reasons urged under Specification II supra.

(b) It is contradictory and conflicting in that it instructed the jury that Article 85, Exception 1, precludes a physician from prescribing morphine to an addict not suffering from an incurable disease, or who is not aged and infirm, and at the same time instructed the jury that Article 85, Exceptions 1 & 2, do not preclude a physician from prescribing small amounts of morphine for

an addict sufficient to relieve a condition incident to addiction.

SPECIFICATION V

(Assignment of Error V, Tr. 13, 14)

The court erred in giving the following instruction to the jury during the course of its charge, viz:

> "The good faith of the defendant treating Pat Rooney, as a physician, for the purpose of curing him from the narcotic habit is an important issue involved in this case. *One of the objects of the Narcotic Act was no doubt intended to prevent the growing use of these narcotics deemed a menace to the nation by Congress.* If a physician and the others mentioned in the exceptions could sell and dispense these narcotics regardless of the fact whether it be done in good faith for the relief of a patient, *then the moral object of the Act is entirely defeated,* notwithstanding the fact that it is primarily a revenue measure. It cannot be claimed that a physician selling and dispensing these narcotics through a prescription, or otherwise, not in good faith for the purpose of securing the cure of one suffering from an illness, or to cure him from the narcotic habit, is doing so in the course of his professional practice only as prescribed by the express language of the Act." (Tr. 37, 38). (Italics ours)

The foregoing instruction is erroneous and prejudicial for the following reasons:

(a) It is in part predicated upon the moral and social aspect of the Harrison Narcotic Act whereas the Act can be justified only as a revenue measure.

(b) An instruction treating with the moral or social aspect of the Harrison Narcotic Act

could have no proper place in the court's charge and it prejudiced the jury against appellant.

(c) The instruction precluded appellant from prescribing morphine for Rooney to relieve a condition incident to his addiction to the drug, and confined appellant to prescribing the drug to cure Rooney of morphine addiction.

BRIEF OF THE ARGUMENT

SPECIFICATION OF ERROR I

THE INDICTMENT IS FATALLY DEFECTIVE BECAUSE IT (a) FAILS TO ALLEGE THAT ROONEY OBTAINED THE DRUG ON THE PRESCRIPTIONS OR THAT A SALE OF THE DRUG WAS MADE OTHERWISE BY APPELLANT AND (b) BECAUSE THE INDICTMENT DOES NOT DISCLOSE THAT APPELLANT COMMITTED THE OFFENSE OF DEPRIVING THE GOVERNMENT OF REVENUE AS PROVIDED BY THE HARRISON NARCOTIC ACT.

(a) Both counts of the indictment allege that appellant did issue and dispense to the said Pat Rooney, alias Fred Humphrey, a certain prescription for the designated grains of morphine sulphate, but the indictment does not allege that the prescriptions were filled or that Rooney obtained the drug (Tr. 1, 2, 3). This defect in the indictment was attacked by demurrers (Tr. 16, 17) which were overruled and exception noted (Tr. 17, 18). The defect in the indictment in this respect is fatal to its validity.

Aiton vs. U. S. (CCA 9) 3 Fed. (2nd) 992;
Strader vs. U. S. (CCA 10) 72 Fed. (2nd) 589

The indictment considered in the Aiton case, decided by this court, went farther than the indictment in this case by alleging that there was an "intent" and "purpose" to sell the drug. Here there is only the restricted allegation of "issuing" and "dispensing" the *prescription.*

In Strader vs. U. S. supra, the Circuit Court of Appeals for the Tenth Circuit cited and followed the decision of this court in the Aiton case and said:

> "The mere writing of a prescription with the intent and purpose that the person to whom it is given will obtain the drug is not a violation of the statute. Acquisition of the opiate is required to constitute the completed offense."

Perhaps counsel for the government will place some reliance upon the cases of Nelms vs. U. S. (CCA 9) 22 Fed. (2nd) 79, and Manning vs. U. S. (CCA 8) 31 Fed. (2nd) 911, but if so they must be read with the understanding that the indictments there considered alleged the drug was actually obtained by the persons receiving the prescriptions. In the Nelms case it was considered (but assuredly with regard to the specific allegations of the indictment in that case) that Sec. 332 of the Criminal Code had some application. That section provides in effect that one who aids and abets in the commission of an offense is a principal actor. The offense assuredly must be completed before one may be charged with aiding or abetting its commission. It was so decided by this court in Yenkichi Ito vs. U. S. (CCA 9) 64 Fed. (2nd) 73 (Cert. den. 289 U. S. 762). The case of Manning vs. Biddle (CCA 8) 14 Fed. (2nd) 518, cited in the Yenkichi Ito case, is decisive of the point.

(b) The indictment in this case reveals a studious effort upon the part of the pleader to avoid the ef-

fect of the decision of the Supreme Court in the case of Linder vs. U. S. 268 U. S. 5, which reversed the decision of this court (290 Fed. 173). The indictment here does not allege that appellant was registered under the Harrison Narcotic Act or that Rooney was his patient (Tr. 1, 2, 3). The proof discloses that appellant was so registered (Tr. 18) and that Rooney had been addicted to morphine for 18 or 19 years at the time appellant prescribed for him (Tr. 18).

The small amount of the drug prescribed negatives the conclusion that appellant had in view a purpose to evade the payment of the tax required by the Harrison Narcotic Act and, since the drug was dispensed by two prescriptions calling for only three and four grains of morphine respectively, it cannot be said that the dispensing was not in the course of appellant's professional practice as required by the Act. Sec. 696, Title 26, U.S.C.A., and Linder vs. U. S., supra, reaffirmed in Boyd vs. U. S. 271 U. S. 104.

If it may be said that the lack of allegations in the indictment avoids the application of the Linder case to it in the respects urged in this subdivision (b) of Specification I, then we now mention that the argument made here and subsequently, in its application to the facts proved, and the errors assigned, will disclose that the whole case falls squarely within the doctrine of the Linder case.

SPECIFICATION OF ERROR II

THE HYPOTHETICAL QUESTION EXCLUDED THE PRESCRIBING OF MORPHINE BY APPELLANT TO ROONEY WHO WAS AN ADDICT NOT SUFFERING WITH INCURABLE DISEASE.

The hypothetical question considered under this Specification, the objections thereto and the exception, appear at pages 22 to 25 of the Transcript.

Article 85, Exception 1, referred to in the hypothetical question, and the question itself, limited appellant to prescribing the drug for incurable disease. There was no alternative under the regulation (Tr. 24, 25) since the Commissioner of Internal Revenue by this regulation has in this manner definitely proscribed the professional practice of a physician in dispensing morphine to an addict. Under it a physician can only prescribe for *incurable* diseases such as cancer, advanced tuberculosis and other diseases *within this class*, and to aged and infirm addicts. The Harrison Narcotic Act, while it authorizes the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, to prescribe rules and regulations for the enforcement of the Act (Sec. 704, Title 26, U.S.C.A.) does not delegate to him authority to restrict the practice of a physician in the manner attempted by Article 85. The Act itself (Sec. 696, Title 26, U.S.C.A.) regulates the conduct of the physician in prescribing the narcotic by enacting that he may prescribe it in the "course of his professional practice only." That practice is established by testimony of physician based upon standards accepted by the profession, not by regulations arbitrarily fixed by the Commissioner of Internal Revenue. The Commissioner has said the disease must be incurable, or the addict aged and infirm, before the physician may prescribe the drug. Therefore he excludes administering morphine for diseases which may be cured, however distressing and painful. The Commissioner says the physician may not prescribe the drug to keep the addict comfortable by maintaining his cus-

tomary use. He thereby excludes dispensing the drug to an addict to relieve a condition *incident to addiction.*

In the Linder case, the Supreme Court refused to tolerate such a restriction upon a physician in prescribing narcotics for an addict although not suffering from incurable disease, nor aged and infirm. Said the court:

> "It (meaning the Harrison Act) says nothing of 'addicts' *and does not undertake to prescribe methods for their medical treatment.* They are diseased and proper subjects for such treatment, and we cannot possibly conclude that a physician acted improperly or unwisely or for other than medical purposes solely because he has dispensed to one of them in the ordinary course and in good faith four small tablets of morphine for *relief of conditions incident to addiction.* (Italics ours)

This pertinent part of the Linder decision undoubtedly was not considered by the Commissioner of Internal Revenue when he promulgated Article 85. He continued on where the Congress assumed it constitutionally left off.

Continuing the Supreme Court said:

> "What constitutes bona fide medical practice must be determined upon consideration of *evidence and attending circumstances.*" (Italics ours)

Congress never intended that the Commissioner of Internal Revenue should determine what constitutes bona fide medical practice, because otherwise there would be an unwarranted delegation of power.

Hurwitz vs. U. S. (CCA 8) 280 Fed. 109 and cases cited;

Morrill vs. Jones, 106 U. S. 466.

In the case of Hurwitz vs. U. S., supra, the trial court had instructed the jury as follows:

> "A physician is not in personal attendance unless he is in personal attendance of such patient away from his office."

The instruction was taken from the language of a regulation also promulgated by the Commissioner of Internal Revenue for the enforcement of the Harrison Narcotic Act. The court in declaring the regulation void, because beyond the authority delegated, said:

> "The evidence showed that what the defendant did was at his office. We presume the court took the language used from the rule above mentioned * * * * *. The power of the commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, for making all needful rules and regulations for carrying the provisions of the Narcotic Act into effect, did not confer the power to say that a physician could not personally attend a patient at his office. The enforcement of the Act did not require any such rule, and it is contrary to the language of the Act itself, *which is plain and unambiguous*, and says nothing about where the patient shall be when personally attended. (Italics ours)

In support of its decision, the court cites several cases decided by the Supreme Court of the United States, including the case of Morrill vs. Jones above cited.

It is conceded that the hypothetical question propounded to Dr. Townsend, or to any other physician having regard for his professional reputation, could only have been answered negatively since it committed the witness to judging the professional conduct of appellant by limiting that conduct to prescribing the drug for incurable disease only. Rooney was not incurably diseased, as the question stated, but he was a chronic morphine addict (Tr. 47) using as much as 10 or 15 grains per day (Tr. 18). The question as propounded and answered excluded the possibility of the jury returning a verdict favorable to appellant. Probably in order to frustrate the attack directed at it, the question is made to state that two prescriptions were dispensed to the addict on the same day, but that was likewise true in the Linder case and the prescriptions considered there were for different narcotics!

The accepted practice as established by the evidence of other physicians determines the professional conduct of his fellow physicians in prescribing narcotics, not the arbitrary conclusion of the Commissioner. Therefore the hypothetical question should not have embraced the regulation of the Commissioner by reference to it and by stating the purport of it. Linder vs. U. S., supra.

SPECIFICATION OF ERROR III

THE INDICTMENT ALLEGES THAT THE SALE OF THE DRUG WAS MADE TO ROONEY. THE PROOF DISCLOSES THAT THE SALE WAS MADE TO NARCOTIC AGENT MOORE THROUGH THE AGENCY OF ROONEY. HENCE THERE IS A FATAL VARIANCE BETWEEN THE PROOF AND THE INDICTMENT.

The testimony relating to this Specification appears at pages 18 to 21 of the Transcript. The motion for verdict based thereon, the ruling of the court denying the motion, and the exception appear at pages 25 to 26 of the Transcript.

The proof shows without dispute that Narcotic Agent Moore sent Rooney to appellant's office to obtain the prescriptions described in both counts of the indictment (Tr. 18 to 21) and that Moore gave Rooney the money to pay for the prescriptions (Tr. 18 to 21). Moore took Rooney to the drug stores where Rooney had both prescriptions filled (Tr. 18 to 21). Moore gave Rooney the money to fill the prescriptions (Tr. 18 to 21). Rooney delivered to Moore the drug obtained on both prescriptions and Moore kept the drug in his possession until it was introduced in evidence at the trial of the case (Tr. 18 to 21). The indictment makes no mention of Moore. No conspiracy or criminal agency or attempt to commit the offense is alleged. Appellant is charged as a principal only, not *particeps criminis* (Tr. 1, 2, 3). The proof reveals that the drug was obtained by Moore through the agency of Rooney, but there is no allegation in the indictment of this proved fact.

Reverting to Specification of Error I, it is seen that the indictment is attacked because it does not allege that the prescriptions were filled. The error in this respect now becomes more apparent, because, while it does appear from the proof that the prescriptions were filled, nevertheless the proof discloses that Rooney had them filled for Moore.

It seems obvious that in drawing the indictment it was the purpose of the learned counsel for the government to circumscribe it with that exact concise-

ness which might render it impervious to demurrer, but at the same time leaving to chance its efficacy when measured by the proof. That the variance is fatal in the respect asserted seems obvious. Cf. Strader vs. U. S. (CCA 10) 72 Fed. (2nd) 589.

SPECIFICATION OF ERROR IV

THE TRIAL COURT ERRED IN CHARGING THE JURY IN THE EXACT LANGUAGE OF ARTICLE 85, SECTIONS 1 & 2, THEREBY CONFORMING APPELLANT'S PROFESSIONAL CONDUCT TO SUCH REGULATION, AND THEN BY CHARGING THE JURY THAT SAID REGULATION DID NOT PRECLUDE APPELLANT FROM PRESCRIBING A MODERATE AMOUNT OF THE DRUG IN ORDER TO RELIEVE A CONDITION INCIDENT TO ADDICTION BECAUSE (a) THE REGULATION IS VOID AND (b) THE INSTRUCTION IS CONTRADICTORY AND CONFLICTING.

The instruction appears at pages 32 to 34 of the Transcript and the objection to it and exception appear at page 52.

(a) The validity of Article 85, Sections 1 & 2, which the instruction quotes *in todidem verbis* (Tr. 32, 33) is discussed in Specification II of this brief. A repetition of the discussion will serve no useful purpose, but the court is respectfully requested to consider and apply it to this Specification of Error.

(b) The trial court had charged the jury that the Harrison Act itself permitted appellant to prescribe the drug if, repeating the language of the Act, it was prescribed "in the course of his professional con-

duct only" (Tr. 31). The trial court thus correctly conformed the charge to the Act itself. But the court proceeded farther and charged in the language of Article 85 (Tr. 32, 33). The learned trial judge apparently was not sure of his position and evidently sought to reconcile a regulation, doubtful as to its validity, with the Act itself by alternately charging the jury as follows:

> "The statute does not prescribe the disease for which morphine may be supplied. Regulation 85 in its provisions forbids the giving of a prescription to an addict or habitual user of narcotics not in the course of professional treatment, but for the purpose of providing him with a sufficient quantity to keep him comfortable by maintaining his customary use. Neither the statute *nor the regulations* precludes a physician from giving an addict a moderate amount of drugs in order to relieve a condition incident to addiction, if the physician acts in good faith and in accord with fair medical standards." (Tr. 33, 34). (Italics ours)

A correct interpretation of Article 85, Sections 1 & 2, in their relation to the Act is indispensable to a correct decision of this case. It was necessarily erroneous therefore for the trial court to have left to the jury the solution of this important legal question. The regulation definitely inhibits the prescribing of the drug for the purpose of relieving a condition incident to addiction unless the addict is aged and infirm. The learned trial judge so charged the jury (Tr. 33) but then charged that the *regulation* did not preclude a physician from prescribing a moderate amount of the drug for the purpose of relieving a condition incident to addiction (Tr. 33, 34). The regulation and the instruction are antipodal. Appellant asserts that the regulation (Article 85, Sec-

tions 1 & 2) had no place in the charge at all because it is utterly void, but if it had then the instruction as a whole is contradictory and conflicting with respect to a serious and indispensable issue in the case. A familiar rule of law did not permit the trial court to relinquish its sole function in this respect and cast it over to the jury. The rule is stated as follows:

> "Where instructions give to the jury contradictory and conflicting rules for their guidance, which are unexplained, and following either of which would or might lead to different results, then the instructions are inherently defective and erroneous; and this is true, though one of the instructions correctly states the law as applicable to the facts of the case * * *." 14 R.C.L. (Instructions) Sec. 45, p. 777.

See Drosos vs. U. S. (CCA 8) 2 Fed. (2nd) 538;

Hurley vs. State, 22 Ariz. 211; 196 Pac. 159.

SPECIFICATION OF ERROR V

THE TRIAL COURT ERRED IN CHARGING THE JURY THAT (a) ONE OF THE OBJECTS OF THE HARRISON NARCOTIC ACT WAS INTENDED TO PREVENT THE GROWING USE OF NARCOTICS DEEMED A MENACE TO THE NATION BY CONGRESS, AND (b) THAT IF A PHYSICIAN COULD DISPENSE NARCOTICS NOT IN GOOD FAITH FOR THE RELIEF OF A PATIENT THEN THE MORAL OBJECT OF THE ACT IS ENTIRELY DEFEATED, AND (c) THAT APPELLANT COULD NOT PRESCRIBE THE

DRUG TO ROONEY TO RELIEVE A CONDITION INCIDENT TO ADDICTION.

The instruction appears at pages 37 and 38 of the Transcript, and the objection to it and exception appear at page 52.

(a, b) Under the Federal Constitution the Harrison Act must be justified as a revenue measure. An attempt to justify the Act as a moral measure, or to prevent the national menace of the growing use of narcotics, injects an unrelated prejudicial issue into the case and besides, as thus interpreted, subjects it to grave constitutional doubts. Linder vs. U. S. supra. In case of Nigro vs. U. S. (CCA 8) 7 Fed. (2nd) 553 (particularly pp. 559, 560, 561) an instruction approximating the one given here was condemned under the authority of the Linder case. While it may be conceded that the Act has an incidental moral or social aspect, nevertheless a charge pointing out to the jury these features of the Act, and that it was one of the objects of Congress in enacting it, had no proper place in the case and it necessarily prejudiced the jury. Although a contrary view was taken of the Act in the cases of Oliver vs. U. S. (CCA 4) 267 Fed. 544 and Traver vs. U. S. (CCA 3) 260 Fed. 923, it should be observed that those cases were decided before the Linder case. Assuming the Congress considered the menace to the nation resulting from the growing use of narcotics when the Act was passed, the Congress nevertheless attempted to avoid the constitutional limitation which the trial court failed to heed by justifying the Act as a revenue measure and thereby lift it from the category of a police regulation reserved to the states. Whatever may be the incidental purpose of the Act, the learned trial court interpreted it as a police regulation when

he *charged* the jury with respect to its moral aspect and the menacing effect of the growing use of narcotics.

No charge is fraught with more prejudice than the charge of violating the Harrison Narcotic Act. The suggestion of the moral purpose of the Act, and the menacing effect of the growing use of narcotics in connection with the dispensation of the drug, is anathema to a physician charged with a violation of the Act. When the trial judge emphasizes the moral features of the Act in charging the jury, whereas in strict legal justification there are none, the prejudicial effect is inescapable, and "calculated to be prejudicial." Vd. Nigro vs. U. S., supra, p. 561.

(c) The latter part of this instruction (Tr. 38) charged the jury that appellant, as a physician, could prescribe the drug in good faith only *to cure* illness or the narcotic habit. He was thereby deprived of the benefit of the right to prescribe morphine for Rooney *to relieve* a condition incident to addiction. The Harrison Act does not thus limit appellant in prescribing the drug for an addict and to restrict him in this manner is fundamental error. Linder vs. U. S., and Boyd vs. U. S., supra. If it may be assumed that the first part of this instruction worked no prejudicial harm upon appellant, assuredly the latter part of it committed him to his sure destruction.

The foregoing instruction definitely characterizes the Act as a police regulation. That power, of course, is reserved to the several states. Linder vs. U. S. supra. If, therefore the instruction correctly interprets the Act, then the Act is void, but if not, then the instruction is erroneous.

CONCLUSION

We respectfully assert that this cause originated upon an indictment legally insufficient and proceeded to judgment upon a record erroneous in the several particulars herein pointed out. The learned trial judge conducted the case upon the theory that the Harrison Narcotic Act is a police regulation rather than a revenue measure. Trial courts at times are inclined to interpret the Harrison Narcotic Act in a manner designed to accomplish a purpose desired, which, although commendable in purpose, nevertheless abandons the constitutional limitation within which the Act validly operates. The Supreme Court in the earlier cases encountered difficulty in applying the Act to the practice of physicians. Finally that court in the Linder case definitely clarified conflicting opinions respecting the operation of the Act upon physicians prescribing small doses of the drug for addicts, and confined the Act in such cases within a field which we submit the trial court failed to observe. Contrary to a prevalent notion the offense defined by the Harrison Act does not involve moral turpitude. Vd. Curran vs. U. S. (DCNY) 38 Fed. (2nd) 498.

This case stands upon a plane entirely different from one where the physician dispenses prescriptions for excessive and unnecessary quantities of the drug, thereby affording the opportunity of trafficking in it and evading the tax. Rooney was an addict of long standing. Appellant had no part in creating his unfortunate condition,—he merely prescribed a small quantity of the drug, after payment of the tax, to relieve a condition incident to the addiction. That does not justify, in our opinion, the double penalty which will inevitably follow the judgment, if sustained.

For the reasons herein set forth we respectfully urge that the order of the trial court overruling the demurrers to the indictment be reversed with directions to sustain the demurrers; or, if it is concluded that the trial court did not err in this respect, then that the judgment be reversed upon the remaining errors assigned and the case remanded for new trial.

Respectfully submitted,

LESLIE C. HARDY,
Attorney for Appellant,

422 Professional Bldg.,
Phoenix, Arizona.